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IN THE

Supreme Court of the United States

October Term, 1954.

No. 327

S. KLEIN ON THE SQUARE, INC.,
Petitioner,

AGAINST

THE LIONEL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT IN OPPOSITION.

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RESPONDENT'S BRIEF IN OPPOSITION.

Opinion Below.

The opinion of the New York Court of Appeals is officially reported at 307 N. Y. 229 and 120 N. E. (2d) 802 and appears in the Petition as an appendix (Pet. 13-20).

Statutes Involved.

The statutory provisions involved are §5 of the Federal Trade Commission Act, as amended, Act of July 14, 1952, Chapter 745, 66 Stat. 632 (McGuire Act) 15 U. S. C. §45 and Article XXIV-A of the General Business Law of the State of New York (Fair Trade Law). These statutory provisions are set forth in the Petition as an appendix (Pet. 9-12).

Statement of the Case.

The respondent, a New York corporation, has for many years been and is presently engaged in the business of manufacturing, selling and distributing throughout the United States toy trains and accessories under its exclusive trademarks, brands and labels bearing the name "Lionel" alone or in combination. Its manufacturing activities are conducted partly within and partly outside the State of New York. During the past years, the respondent has built up considerable good will with the purchasing public and with the retailers in the State of New York and elsewhere.

Respondent's products are in fair and open competition throughout the State of New York with commodities of the same general class produced by others.

The respondent and retail dealers entered into a retail price maintenance agreement.

The petitioner, likewise a New York corporation, operates a department store in New York City, but did not enter into any agreement with the respondent relating to the resale price of the respondent's products.

The petitioner offered respondent's trains at prices below those fixed under respondent's agreement with other retailers.

§369-b of New York's General Business Law prohibits all retailers in the State of New York from selling below prices established by an agreement between a vendor and any retailer within the state.

Respondent thereupon commenced this action in the New York Supreme Court, New York County, enjoining petitioner from continuing to offer respondent's products at below respondent's "fair trade" prices.

After the cause was submitted on stipulated facts, the Supreme Court granted judgment for respondent and judgment was entered pursuant to §369-b of the General Business Law, enjoining petitioner from selling respondent's toy trains below prices fixed by respondent. Both the Appellate Division of the Supreme Court and the Court of Appeals affirmed the judgment.

ARGUMENT.

A. The decision of the New York Court of Appeals does not conflict with any decisions of that Court or of this Court.

The constitutionality of the McGuire Act and of the Feld-Crawford Act, popularly known as the New York Fair Trade Law, are no longer open to question. This Court and the New York Court of Appeals have consistently rejected the petitioner's arguments that the fair trade laws are invalid under the Fourteenth Amendment of the Constitution of the United States, as a deprivation of property, without due process of law and that they are a burden on interstate commerce.

Fair trade laws have a long and checkered career. They have been vigorously proposed and just as vigorously opposed by our Courts. The will of the people as evidenced by the acts of the legislature was finally confirmed by our Courts. The compelling legislative history of congressional action is reflected by the Miller-Tydings Act amending the Sherman Antitrust Act, and congressional persistence in passing the McGuire Act in 1952 leaves no room for doubt as to what our lawmakers intended to accomplish in the field of fair trade. The wisdom or lack of wisdom in permitting fair trade laws to prevail in this country is a matter for the legislature and not for the

judiciary to determine. *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183; *Nebbia* v. *New York*, 291 U. S. 502; *Port Chester Wine & Liquor Shop Inc. et al* v. *Miller Brothers, etc.*, 253 App. Div. 188, 1 N. Y. S. (2d), 802 affirmed 281 N. Y. 101, 22 N. E. 2nd 253.

The petitioner's proposition in this case is broad and bold. It asks this Court to disregard the will of Congress, the will of the New York State legislature, the determination of the New York Court of Appeals and the determination of this Court. *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp., supra; Schwegmann Brothers Giant Supermarket, et al.* v. *Eli Lilly & Company*, 109 F. Supp. 269, 205 F. (2d) 788 (C. A. 5, 1953), cert. den. 74 S. Ct. 71; *Bourjois Sales Corporation* v. *Dorfman*, 273 N. Y. 167 (1937); *Bristol Myers Co.* v. *Picker*, 302 N. Y. 61 (1950); *The Lionel Corporation* v. *S. Klein on the Square* (sought to be reviewed), 307 N. Y. 229, 120 N. E. 2nd 802.

The petitioner, in effect, asks this Court to reverse its decision in *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183, 81 L. ed. 109 (1936), upon the theory that its basic premise has been invalidated by this Court's recent decision in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 95 L. ed. 1035 (Statement as to Jurisdiction 6).

Resale price maintenance contracts were first expressly validated in California with the passage of the Fair Trade Act in 1931. These statutes merely legalized resale price agreements and only contracting parties were bound thereby. Two years later, the Act was amended to include a "non-signers" clause, whereby it became unlawful for any dealer to sell below established prices whether or not he had contracted to observe them. Other fair trade acts soon followed, but doubt as to their constitutionality prevented nationwide enactment, until this doubt was resolved by this Court in 1936, when it upheld the Illinois Fair

Trade Act in its entirety in the *Old Dearborn* case above referred to.

The New York Court of Appeals in *Bourjois Sales Corporation* v. *Dorfman, supra,* accepted the judgment of this Court overruling its prior decision in *Doubleday Doran & Co. Inc.* v. *R. H. Macy & Co. Inc.,* 269 N. Y. 272, 199 N. E. 409.

Obviously, one of the most significant features of the state fair trade acts is that non-signers of fair trade agreements are bound to observe the resale price provisions contained in said agreements.

The effectiveness of the Miller-Tydings Act (1937) by way of amendment to the Sherman Antitrust Act, in exempting fair trade agreements from the Sherman Antitrust Act, depended to a large extent upon whether or not it also exempted the enforcement of these agreements against one who was not a party thereto. This question came before this Court in *Schwegmann Bros.* v. *Calvert Distillers Corp., supra.* In that case, this Court determined that the Miller-Tydings Act exempted from the Sherman Antitrust Act only voluntary agreements, where such agreements are lawful under local law, but that the Sherman Antitrust Act is violated by a state fair trade law which permits enforcement of an interstate price agreement for the maintenance of minimum resale prices, against a dealer who is not a party to the agreement.

Congress promptly acted to enlarge the scope of the Miller-Tydings Act and passed the McGuire Act in 1952.

It is seriously doubted that *Schwegmann Bros.* v. *Calvert Distillers Corp., supra,* opened the door to an appraisal of the *Old Dearborn* case. The *Schwegmann* v. *Calvert* case involved no constitutional question and confined itself solely to the interpretation of the Antitrust Act as amended by the Miller-Tydings Act with respect to the enforcement of state fair trade laws in interstate

commerce. This Court decided therein that the intention of Congress was to authorize interstate enforcement against the signers of an expressed contract or an agreement, but not against non-signers. There is no implication in the *Schwegmann* case that Congressional approval of enforcement against non-signers would be unconstitutional. In fact, the implications of the opinion are to the contrary. *Schwegmann Brothers Giant Supermarket, et al.* v. *Eli Lilly & Company*, 109 F. Supp. 269, 205 F. (2d) 788 (C. A. 5, 1953), a decision which this Court twice refused to review (cert. den. 346 U. S. 856, rehearing den. 346 U. S. 905); *The Lionel Corporation* v. *S. Klein on the Square, Inc.*, 307 N. Y. 229, 120 N. E. 2nd 802 (case below).

B. The decision of the New York Court of Appeals is consistent with time honored principles.

Not only are the petitioner's charges of conflict with other decisions groundless, but the decision of the Court of Appeals in this case is based upon sound principles which have long been accepted by this Court.

The general rule is firmly established that the provisions of the Fourteenth Amendment do not operate as a limitation upon the police power of the state to pass and enforce such laws as will inure to the health, morals and general welfare of the people. Statutes designed to protect trade and commerce from unlawful restraints and monopolies are not unconstitutional as depriving those to whom they apply of their property or privileges without due process of law. *Nebbia* v. *New York*, 291 U. S. 502; *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183; see also *Appalachian Coals, Inc. et al.* v. *United States* (1933), 288 U. S. 344.

The Fifth and Fourteenth Amendments were invoked as a challenge to the constitutionality of the Illinois Fair Trade statute in the *Old Dearborn* case, *supra*. This

Court in the *Old Dearborn* case met the challenge by distinguishing between cases involving legislative price fixing and fair trade cases (229 U. S. 192); by proclaiming that the price restriction under a fair trade contract is an appropriate means of a perfectly legitimate end, since a commodity acquired under such fair trade agreement is acquired with knowledge of an existing restriction. The voluntary acquisition of such commodity carries with it an assent to the protective restriction thereon (299 U. S. 192). By deciding that the non-signers' clause is not arbitrary, unfair or wanting in reason, since it is intended to protect good will against injury as applied to branded merchandise (299 U. S. 195).

The due process arguments were disposed of by the New York Court of Appeals in *Bourjois Sales Corporation* v. *Dorfman,* 273 N. Y. 167 (1937) and in the case below.

The petitioner's arguments concerning delegation of powers were likewise disposed of many years ago in the *Old Dearborn* case and in the *Bourjois* case *supra* and in the case below.

Congress in passing the Miller-Tydings Act and in later enlarging that by passing the McGuire Act did not abdicate any power; it merely erased some of the prohibitions contained in the original Sherman Antitrust Act. The states, likewise, abdicated no lawmaking power in enacting fair trade acts; they merely defined what they considered to be unfair competition.

The petitioner contends that the New York statute is unconstitutional under the commercial clause of the Federal Constitution, despite Congress' effort to immunize fair trade legislation by the McGuire Act. (Statement as to Jurdisdiction 15.)

Prudential Insurance Co. Inc. v. *Benjamin,* 328 U. S. 408 and *Southern Railway Co.* v. *Arizona,* 325 U. S. 761

have disposed of this issue and are referred to in the opinion below. Congress by passing the Miller-Tydings and the McGuire Acts, has undoubtedly acted within its power "to redefine the distribution of power over interstate commerce" by permitting states to regulate a phase of commerce in a manner which would otherwise not be permissible. The instances are numerous in which Congress by inaction has allowed states to regulate interstate commerce for long periods of time (*The Minnesota Rate Cases*, 230 U. S. 352, 396-400). Obviously, there should be even less restriction upon the power of a state acting under an expressed grant by Congress under the McGuire Act.

CONCLUSION.

The petitioner has presented no arguments which have not been presented many times before, both to this Court and to the State and Federal Courts throughout the land. These arguments have not met with favor by our Courts. The petitioner's petition is untenable in face of precedent and the will of the legislature.

The decision of the New York Court of Appeals in the case below was clearly correct.

It is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

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Dated: New York City
September , 1954.